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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 696

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PATRICK MORGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing an order dismissing a petition seeking relief, in the nature of a writ of error *coram nobis*, from an earlier federal conviction, the sentence upon which had been served. The Court below ordered the cause remanded to the District Court for a hearing.

OPINION BELOW

The opinion of the Court of Appeals (R. 17-20) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 5, 1953 (R. 20). On March 5, 1953, Mr. Justice Jackson entered an order ex-

tending the time within which to file a petition for a writ of certiorari to and including April 6, 1953 (R. 21) The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether United States District Courts have jurisdiction to grant relief in the nature of a writ of error *coram nobis* to vacate a judgment of conviction and sentence after expiration of the full term of sentence.

2. Whether, if such jurisdiction exists, an allegation that respondent had not intelligently waived counsel, without any allegation as to his innocence or as to reasons for delay, was sufficient to require the court to hold a hearing.

STATUTE INVOLVED

28 U. S. C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

STATEMENT

On December 18, 1939, in the United States District Court for the Northern District of New York, respondent pleaded guilty to an indictment which charged him with stealing certain letters from the mails and unlawfully removing the contents, in violation of what was then section 194 of the Criminal Code [18 U. S. C. (1946 ed.) 317], and forgery of a money order and uttering the same, in violation of section 218 of the Criminal Code [18 U. S. C. (1946 ed.) 347] (R. 1-5). He was thereupon sentenced to four years' imprisonment (R. 6, 7). He served out this term (R. 8).

In 1950, he was convicted of another offense in a New York state court and was sentenced as a second offender to serve from seven to ten years (R. 8, 17). He is currently confined under that sentence (R. 8, 12).

On February 11, 1952, respondent applied to the United States District Court for the Northern District of New York for a common law writ of error *coram nobis*, seeking an order vacating and setting aside his conviction in that court on the ground that he had not been given the assistance of counsel, and had not waived his constitutional right to such assistance (R. 8). The motion was opposed by the United States Attorney, and denied by the District Court, on the theory that it was, in effect, a motion under 28 U. S. C. 2255, and as such was insufficient because Morgan was not in custody under the sentence being attacked (R. 11-12).

The Court of Appeals, however, held that the petition invoked the jurisdiction of the court to vacate judgments for errors correctible at common law by *coram nobis*. This remedy, it thought, was not affected by the passage of section 2255.[1] Accordingly, it remanded the case to the District Court for a hearing on the question whether respondent had in fact been represented by counsel at his federal trial or had intelligently waived such representation (R. 19, 20).

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the decision below and the recent decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Kerschman*, 201 F. 2d 682, decided February 18, 1953, the opinion in which is printed as an Appendix to this petition, pp. 11-16, *infra*.

In the *Kerschman* case the petitioner, like respondent in the present case, was in custody in a New York state prison as a second offender. He challenged the validity of a 1934 federal conviction for interstate transportation of a stolen automobile, entered against him in the Northern District of Illinois, the sentence under which he had already

[1] The same court had previously held that relief under section 2255 was available only to a prisoner in custody under the sentence he attacked, *United States* v. *Lavelle*, 194 F. 2d 202, leaving open the question, decided in the instant case, whether "interposition by motion outside the Rules" would be justified where the movant was "in custody under the judgment of a state court, the duration of the sentence upon which depended upon the validity of the federal judgment." *United States* v. *Bradford*, 194 F. 2d 197, 201 (on rehearing), certiorari denied, 343 U. S. 979.

served. He alleged, as does respondent here, that he had been improperly deprived of the right to counsel, in that he had had no counsel and had not intelligently waived his right to counsel. He alleged, moreover, unlike respondent here, that he was not guilty of the earlier federal offense charged against him, and that he had pleaded guilty to it only because he thought that it was sufficient that he had driven a stolen car across state lines, without respect to whether he knew it to be stolen. And he alleged that he had only recently become apprised of the precise nature of the crime of which he had been convicted. The Seventh Circuit held that the petition was not a proper one under 28 U. S. C. 2255 because Kerschman was not in custody under the challenged sentence. It held further that *coram nobis* was not available because Rule 60(b) of the Federal Rules of Civil Procedure had abolished relief by way of that writ.

The square conflict between that ruling and the decision below—leaving the question whether a New York State prisoner should remain in jail to depend on whether an earlier federal conviction was in Illinois or New York—is one which requires resolution by this Court.[2] The basic, important

[2] Differing with the opinion of the Court of Appeals for the Seventh Circuit in the *Kerschman* case that Rule 60(b) of the Rules of Civil Procedure abolished *coram nobis* in criminal cases, we argue below, for different reasons, that 28 U. S. C. 2255 marks the present limits of the relief available under that common-law writ—*i. e.*, permits such relief only to one who is serving the sentence he challenges. What is important here is that the result for which we contend, squarely contrary to the decision below, was the one at which the Seventh Circuit arrived in *Kerschman*.

issue in these cases is whether there can ever be any finality against collateral attack for federal criminal judgments. Since the remedy by motion under 28 U. S. C. 2255 is completely adequate for the entire period that a prisoner is in custody under the sentence, the existence of *coram nobis* jurisdiction is at present invoked primarily for the purpose of attacking sentences which have fully run their course. Thus, in the instant case, the proceeding relates to a judgment entered in 1939, in the *Kerschman* case, to a judgment entered in 1934—and in both cases to sentences which had long since been served when the proceedings were brought.

It is the Government's position that there must come a time when a criminal judgment can be taken as conclusive against attack for alleged invalidity on jurisdictional grounds *dehors* the record (*cf.* fn. 5, p. 8, *infra*), and that this point is reached when the sentence imposed by the judgment has expired. This conclusion is, we submit, suggested by the history of the Federal Rules of Criminal Procedure and required by the congressional enactment of 28 U. S. C. 2255.

Before the promulgation of the Federal Rules of Criminal Procedure in 1946, it was an unsettled question, specifically left open by this Court in *United States* v. *Mayer*, 235 U. S. 55, 69, whether the writ of error *coram nobis* was available in criminal cases in the federal courts.[4] In this state of

[4] However, the Third, Fourth and Ninth Circuits had sustained petitions seeking relief by way of a motion in the nature of a writ of error *coram nobis*. *United States* v. *Steese*, 144 F. 2d 439, 442 (C. A. 3); *Roberts* v. *United States*, 158 F. 2d 150

the law, it was proposed in Rule 33 of the final draft of the Rules of Criminal Procedure submitted to this Court that the requirement of its precursor (Rule II of the former Criminal Appeals Rules, 292 U. S. 662)—that a motion for a new trial on grounds of newly discovered evidence be made within 60 days—be changed to permit such a motion to be made at any time, and also to permit at any time a motion for a new trial based on the deprivation of a constitutional right. This latter type of motion would in effect have afforded the type of relief deemed available by way of *coram nobis* by the courts which had recognized such jurisdiction and would have made such relief available at any time. This Court, on its own initiative, deleted the provision for a motion based on denial of a constitutional right and limited to two years the period within which to move for a new trial on the ground of newly discovered evidence. See *Federal Rules of Criminal Procedure with Notes and Proceedings* (N. Y. U. School of Law, 1946), p. 206. Thus this Court declined, in its rule-making capacity, to assume *coram nobis* jurisdiction or its equivalent,[4] and indicated that, even as to newly discovered evidence, which by definition relates to matters which could not have been known at the trial, some period of limitation against judi-

(C. A. 4); *Robinson* v. *Johnston*, 118 F. 2d 998 (C. A. 9), judgment vacated and cause remanded, 316 U. S. 649, reversed on other grounds, 130 F. 2d 202. See, also, *Tinkoff* v. *United States*, 129 F. 2d 21 (C. A. 7).

[4] See *United States* v. *Smith*, 331 U. S. 469, 475, n. 4, decided in 1947, where this Court stated that it doubted whether, if the remedy existed, it was likely to be of any value.

cial action to set aside criminal judgments was desirable.[5]

Thereafter, Congress, in the revision of the Judicial Code, enacted 28 U. S. C. 2255, granting to a prisoner "in custody" under sentence of a federal court the right collaterally to attack such sentence by a motion in the sentencing court. There is no inconsistency, as the court below seems to suggest (R. 18-19), between the statement of this Court in *United States* v. *Hayman*, 342 U. S. 205, 219, that this remedy was designed "to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts," and the statement in the Reviser's note to Section 2255 that "this section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*." It is evident that, as a practical matter, error of the "fundamental character" always thought necessary to sustain *coram nobis* (see *United States* v. *Mayer*, 235 U. S. 55, 69) would be an error going to the jurisdiction of the court (*i. e.*, within the scope of inquiry on habeas corpus) under the expanded concept of jurisdiction recognized by the time of the revision of the Judicial Code in 1948. Section 2255 merely allows a motion (in the nature of a writ of error *coram nobis*) as a preliminary to, and in most cases a substitute for, the relief available by habeas corpus, but, in thus conferring *coram nobis* juris-

[5] Under the rules only a motion under Rule 35 to correct an illegal sentence and a motion to correct clerical mistakes under Rule 36 may be made "at any time."

diction on the federal courts, Congress at the same time limited that jurisdiction to cases where a prisoner is in custody under the sentence which he attacks.

The jurisdiction of the federal district courts is a matter of statute. *Cary* v. *Curtis*, 3 How. 236, 245; *Gillis* v. *California*, 293 U. S. 62, 66. As noted above, even before the enactment of 28 U. S. C. 2255, there was doubt whether the statutory jurisdiction of district courts over "all offenses against the laws of the United States" (18 U. S. C., Supp. V, 3231) was sufficient to confer upon them jurisdiction to entertain a writ of error *coram nobis*, which traditionally commenced a new, separate, and independent proceeding. See *Jaques* v. *Caesar*, 2 Saunders (K. B.) 100, 101, n. 1, 85 Eng. Rep. 776, 781; 2 Tidd, *Practice* (9th ed.) 1134, 1141. Clearly, after Congress enacted a statute which was described as clarifying that remedy, there is no basis for assuming that jurisdiction exists outside the statute.

2. Even if there is jurisdiction to entertain a common-law writ of error *coram nobis*, there is a conflict between the decision of the court below and the recent decision of the Court of Appeals for the District of Columbia Circuit in *Farnsworth* v. *United States*, 198 F. 2d 600, certiorari denied, 344 U. S. 915. In that case, it was held that, even if *coram nobis* were available, the petitioner there was not entitled to relief because there was no showing that a retrial would result in a different judgment, because he had slept too long on his

rights, and because he had had full opportunity at the time of his state sentence in New York to contest the validity of his prior federal conviction.

These grounds for denial of the motion apply equally to the substantially identical facts of the instant case. Respondent's petition does not even attempt to show that a new trial would result in a judgment different from that reached in 1939, nor does it attempt to excuse his failure for nearly 14 years to make in any form or forum the objections now urged. Nevertheless, the court below, in remanding the cause for hearing, has stated (R. 19) that if petitioner "can establish that he was deprived of his common-law right to be represented by counsel at the time * * * and he in no way waived that right, there would be a proper case for allowing a writ of error *coram nobis*."

Consequently, there is a conflict which this Court should resolve, not only as to the availability of non-statutory *coram nobis* at all, but also as to the showing necessary for such relief, if it exists.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

APRIL 1953.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1952—JANUARY SESSION, 1953

No. 10706

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HYMAN KERSCHMAN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

February 18, 1953

Before MAJOR, *Chief Judge;* FINNEGAN and SWAIM, *Circuit Judges*

SWAIM, *Circuit Judge:*

This is an appeal from a judgment of the District Court dismissing, for lack of jurisdiction, the motion filed by the defendant-appellant, Hyman Kerschman, under Section 2255 of Title 28, United States Code.

The motion attacked the validity of, and sought to vacate, a judgment and sentence imposed on the defendant in April 1934. This sentence was imposed on the defendant by the United States District Court for the Northern District of Illinois, Eastern Division, on his plea of guilty to an indictment which charged him, in the first count, with receiving, possessing and concealing a stolen vehicle in commerce, and in the second count, with

transporting said stolen vehicle. The sentence of a year and a day was imposed in gross without apportionment between the two counts.

In his motion the defendant alleged that he first pleaded not guilty but later changed his plea to guilty on the representation of an Assistant United States Attorney that he would receive only a suspended sentence. The defendant further represented in his motion that at that time he understood that he was being charged only with transporting; that he never saw a copy of the indictment; that the indictment may have been read to him but that, if it was, he did not understand it; that he was not represented by an attorney, was not asked if he wanted an attorney, and at no time said that he did not want to be represented by an attorney.

Defendant further alleged that he was completely unfamiliar with what was going on and entirely unable to protect himself; and that while the vehicle may have been stolen, he did not know it, and did not realize that lack of knowledge was a defense to the charge of transportation. He alleged that he did not know until in 1951 that he had been found guilty of anything more than transporting the stolen vehicle in commerce. Defendant also said that in 1951 he was convicted of a felony in the State of New York and that, because of his 1934 conviction, he was sentenced by the New York court as a second felony offender; and that at the time of the filing of his motion he was serving time as a second felony offender in the New York penitentiary under the sentence of the New York court because of his conviction in 1934 on the second count of the indictment.

We think the facts alleged in the defendant's motion clearly show that he was not entitled to relief under section 2255. That section, as amended in 1949, reads in part as follows:

> "A prisoner *in custody under sentence* of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that *the sentence* was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed *the sentence* to vacate, set aside, or correct *the sentence*.
>
> "A motion for *such relief* may be made at any time." (Our emphasis.)

The quoted portion of this section clearly shows the intention to limit the relief granted by this section to persons *in custody* under *the sentence* which is being attacked by the motion. In the instant case the prisoner had long since finished serving the sentence which he sought to attack. It is true that he is now in custody, but that custody is in a state penitentiary in New York under a sentence imposed by a New York court. Defendant's motion states that he is serving this sentence as a second felony offender. His motion does not state whether he has yet served the amount of time to which he would have been sentenced for the felony he committed in New York if that sentence had not been for a second felony. Even though the defendant may now be serving the additional time he was

given because of his being a second offender, his case still does not fit the specifications which are spelled out in Section 2255.

In *Crow* v. *United States*, 9 Cir., 186 F. 2d 704, the prisoner, while serving the first of two sentences which were to be served consecutively, attacked the validity of the second sentence by a motion made pursuant to Section 2255. After a careful analysis of the purposes and the provisions of that section the court said, page 705, that the provision in that section that, "A motion for such relief may be made at any time," is controlled by the preceding provisions of the section, and that, therefore, the words "at any time" mean "at any time the prisoner is *in custody under the sentence which he attacks.*" (Our emphasis.)

In *Lopez* v. *United States*, 9 Cir., 186 F. 2d 707, the court made the same ruling on a motion made by a defendant after he had served the sentence which he was attacking. See also *Farnsworth* v. *United States*, C.A.D.C., 198 F. 2d 600.

The decisions on which the defendant is relying are not applicable to a motion under Section 2255. The defendant argues that the merits of his motion should have been considered because in *Fiswick* v. *United States*, 329 U.S. 211, the Supreme Court, on a petition for certiorari, considered the case on its merits, although the appellant there had already served his sentence. The Supreme Court refused to follow the suggestion of the Solicitor General that the cause was moot, because the defendant was an alien and the possibility of deportation and of citizenship would be affected by his conviction if it were permitted to stand. But in that case the defendant was making a direct attack on the judgment by a petition for certiorari, not on grounds

for a collateral attack permitted only under the conditions specified in Section 2255.

In *United States* v. *Steese,* 3 Cir., 144 F. 2d 439, 442, decided in 1944, four years before the enactment of Section 2255 as a part of our civil procedure, the court held that the motion of the petitioner might be treated as a modern substitute for the ancient writ of error *coram nobis* and, therefore, be considered on its merits. But writs of error *coram nobis* were expressly abolished by Rule 60(b) of the Federal Rules of Civil Procedure. In *Roberts* v. *United States,* 4 Cir., 158 F. 2d 150 (1946), the court was also considering the motion as a petition for a writ of error *coram nobis,* not as a motion under Section 2255.

The petitioner here cites *United States* v. *Bradford,* 2 Cir., 194 F. 2d 197, and quotes from the *Per Curiam* decision denying a petition for rehearing in that case. There the defendant had been convicted in a court of the United States on four counts of an indictment. The court thereupon sentenced the defendant to a year and a day on counts one and two, to run concurrently, and suspended the "imposition of sentence * * * on counts three and four, probation for three years to commence after service of sentence on counts one and two." The defendant served the time on counts one and two and was released on September 25, 1950. A few months after his release the defendant filed a motion to vacate the judgment of conviction against him. On defendant's appeal from the denial of his motion the court said, page 200:

> "*Not being in custody* Bradford was in no position to review the conviction by habeas corpus

> * * * and he was in no better position to do so by a motion under § 2255. The section 'was passed * * * to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction;' and its 'sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording *the same rights* in another and more convenient forum.'" (Our emphasis.)

The court there cited *Crow* v. *United States, supra,* as being an exact precedent. While there are some statements in the *Bradford* case which might seem to lend some encouragement to the defendant here, the decision there and the positive statements of the court as to the law do not support the defendant's position.

Thus we see that no decision cited by the defendant, nor any that we have found, would have justified the District Court in assuming jurisdiction and hearing this motion on the merits.

This court wishes to thank Julius Lucius Echeles, Esquire, who was appointed counsel to represent the appellant in the District Court and who continued to represent the appellant on this appeal.

The judgment of the District Court is affirmed.

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